No. 1589

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

OSCAR ASHBY,
Appellant,
vs.
THE CITY OF JUNEAU
(a municipal corporation), etc.,
Appellee.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

BRIEF OF L. P. SHACKLEFORD AND ALFRED SUTRO, AMICI CURIAE, ON BEHALF OF APPELLEE.

L. P. Shackleford,
Alfred Sutro,
Amici Curiae.

Filed this.....day of October, 1909.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

Penau Publishing Co.

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Statement of Facts.

This was an action by the City of Juneau against Oscar Ashby for the condemnation for a public street of certain property, in Juneau, of which Ashby had possession and which abutted upon, and extended into, the street. The appeal is from an order of condemnation in favor of the city and appointing commissioners to ascertain the appellant's damages. There is as yet no final decree of condemnation in the action (Tr. fols. 27-30).

Argument.

FIRST: THE APPEAL SHOULD BE DISMISSED: WRIT OF ERROR WAS THE PROPER MODE OF REVIEW.

The appeal should be dismissed, because the action of condemnation is one at law, and a review of a judgment rendered in such action must be by writ of error and cannot be by appeal.

See,

Walker v. Shasta Power Co., 160 Fed. 856;
South Dakota Cent. Ry. Co. v. Chicago etc. Ry. Co., 141 Fed. 578;
Sharpe v. United States, 112 Fed. 893;
Oregon Short Line R. Co. v. Postal Tel. Cable Co., 111 Fed. 842.

If the case is here improperly by appeal, instead of by writ of error, this Court will of its own motion dismiss it.

See

Toeg et al. v. Suffert, 167 Fed. 125.

SECOND: THE APPEAL SHOULD BE DISMISSED BECAUSE THE JUDGMENT APPEALED FROM IS NOT THE FINAL JUDGMENT IN THE CASE.

Section 504 of the Code of Civil Procedure of Alaska (Carter's Annotated Alaska Codes, p. 252) provides that the United States Circuit Court of Appeals shall have jurisdiction to review by writ of error or appeal "*the final judgments, orders of the district court*" in certain

cases. The so-called "judgment" in the case at bar, from which this appeal is taken, is simply an order by the District Court of condemnation in favor of the city and for the appointment of commissioners, to ascertain the amount to be paid the defendant Ashby as damages for the appropriation of his property. This order was made pursuant to the provisions of Sub. 4 of Section 213 of the Alaska Civil Code (Carter's Codes, p. 398). The final order or judgment of condemnation, which alone could be reviewed by writ of error, has as yet not been made. Such an order is made only after the commissioners have acted. Section 221 of the Alaska Civil Code (Carter's Code, p. 400) provides that

> "When payments have been made, and the bond given, if the plaintiff elects to give one, as required by the last two sections, *the court or judge must make a final order of condemnation,* which must describe the property condemned and the purposes of condemnation. * * *"

This is the final order which the defendant is entitled to have reviewed by writ of error.

See:

Luxton v. North River Bridge Co., 147 U. S. 337, 341;

Southern Ry. Co. v. Postal Tel. Cable Co., 93 Fed. (C. C. A.) 393, affirmed in 179 U. S. 641.

THIRD: THE APPEAL SHOULD BE DISMISSED BECAUSE THE BRIEF OF APPELLANT CONTAINS NO SPECIFICATION OF ERRORS RELIED UPON.

Even if this appeal as such could be entertained, then, we submit, it should be dismissed for want of any specification of errors in the brief of the appellant upon which he relies for a reversal of the judgment.

See:

Moline Trust & Savings Bank v. Wylie, 149 Fed. 734;

Walton et al. v. Wild Goose Mining & Trading Co., 123 Fed. 209;

Western Assurance Co. v. Polk, 104 Fed. 649;

Rules United States C. C. A., 9th Circuit, 24 sub. 2, 6.

FOURTH: THE CITY OF JUNEAU HAS POWER TO CONDEMN PROPERTY FOR STREET PURPOSES.

Two questions are suggested by the appellant in respect to which he believes the decree of the Court below is erroneous. It is first suggested that the City of Juneau has not the power to condemn property for street purposes. But, this suggestion, in view of the plain and direct statutory provisions in the Code of Alaska, relating to the power of eminent domain, does not, we submit, merit serious consideration. That Code expressly provides that the power of eminent domain may be exercised in behalf of roads, streets and alleys.

The language of the statute is as follows (Carter's Alaska Code, Part V, Section 204, Sub. 3):

> "Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses. * * *
>
> "(3) Public buildings and grounds for the use of any precinct, city, town, village, school district, or other municipal division, whether incorporated or unincorporated; canals, aqueducts, flumes, ditches or pipes conducting water, heat, or gas for the use of the inhabitants of any precinct, city, town, or other municipal division, whether incorporated or unincorporated; raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; *roads, streets, and alleys,* and all other public uses for the benefit of any precinct, city, town, or other municipal division, whether incorporated or unincorporated, or the inhabitants thereof, which may be authorized by Congress or other legislative authority of the district."

Just what the argument of the appellant is, with respect to this statute, is not entirely clear; but, it seems to be that he claims that the uses enumerated in this subdivision are qualified by the words "which may be " authorized by Congress or other legislative authority " of the district". Those words, however, clearly have reference to and qualify only "and all other public uses". It is a general rule that a qualifying clause is ordinarily to be confined to the last antecedent, unless there is something in the subject matter which requires a different construction. In other words, the qualifying clause refers to the words which immediately precede it, rather than to those more remote.

See:

Gaither v. Green, 4 So. 210, 213;

Cushing et al. v. Worrick, 75 Mass. (9 Gray) 382, 385.

Moreover, if the construction here contended for by the appellant were sound, it is met by the fact that Congress has specifically authorized the use for which the property of the appellant is here condemned. The Act of April 28th, 1904, referred to in the Brief of Appellant, page 5, entitled, "An act to amend and codify "the laws relating to municipal corporations in the Dis- " trict of Alaska", in Section 4, gives the town councils power "to provide for the location, construction and " maintenance of the necessary streets, alleys, crossing, " sidewalks, sewers and wharves".

FIFTH: THE EVIDENCE SHOWED A NECESSITY FOR THE TAKING OF APPELLANT'S PROPERTY.

The property of the appellant, which was condemned in this action, is situated at a corner formed by the intersection of Front and Franklin Streets (see Exhibit "A", Tr. p. 37). A number of witnesses testified on behalf of the appellee that, with the property of the appellant extending into Front Street, it was impossible to round the corner at Franklin Street with a long load, and that to make Front Street passable at that point for loads with long timbers, or similar loads "where you couple your wagons out" (Tr. p. 52) it was necessary to include in the street the property of the appellant

(Tr. pp. 48, 51, 52, 54, 75, 79, 81, 85, 86). It was also shown that this point was on the main route for teams coming from the wharves, and that the principal teaming business was done from the wharves. The most that appellant can claim is that several of his witnesses contradicted the witnesses of the appellee, and that to that extent the evidence was conflicting. But, as this Court in the case of *Lilienthal v. McCormick,* 117 Fed. 89, said, where the evidence is conflicting

> "the general rule of law upon this subject is well settled that the findings of the Court below upon facts will not be disturbed unless the appellate Court can clearly see that it is opposed to the weight of the evidence, or unless some obvious error or mistake is clearly shown".

See also:

Babcock v. DeMott et al., 160 Fed. 882;

Mastin et al. v. Noble, 157 Fed. 506, 508;

Harrison et al. v. Fite et al., 148 Fed. 781, 785;

Stearns Roger M. Co. v. Brown, 114 Fed. 939, 943;

Kinlock Tel. Co. v. Western Elec. Co., 113 Fed. 652, 665;

Thallman v. Thomas, 111 Fed. 277, 283;

National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693, 716;

Mann v. Keene Guaranty Sav. Bk., 86 Fed. 51, 53;

Metropolitan etc. Bank v. Rogers, 53 Fed. 776, 779.

SIXTH: THE POSSESSION AND POSSESSORY RIGHT OF APPELLANT WERE PROPERTY THAT COULD BE CONDEMNED.

E. M. Barnes, *amicus curiae,* has filed a brief, contending that the possession and possessory right of the appellant are not property that can be condemned. This contention, we submit, is not sound. The statute of Alaska provides that "The right of entry upon and oc- "cupation of lands" is one "of the estates and rights "in lands subject to be taken for public use" (Civil Code of Alaska, Sec. 205, Sub. 3, Carter's Codes, p. 396).

He also contends that ground between high and low water mark is not subject to be taken for a highway. Such, however, is not the law.

See:

Balliet v. Commonwealth, 17 Pa. St. 509; 55 Am. Dec. 581.

It is respectfully submitted that, for the reasons herein stated, the appeal should be dismissed, and, if not dismissed, then that the order appealed from should be affirmed.

L. P. Shackleford,
Alfred Sutro,
Amici Curiae.